No. 10,357

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

MARY T. MARIN,
Appellee.

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

The facts are not controverted. Congress enacted certain statutes referred to in the complaint and the Secretary of the Navy executed a declaration of taking pursuant to the statutes. Both the statutes and the declaration of taking are set forth in the transcript of record and the appendix to appellant's opening brief. The controversy arises over the interpretation of these statutes and this declaration. Congress appropriated money "for essential equipment and facilities at either private or naval establishments" and granted the Secretary of the Navy authority to acquire lands, erect or extend buildings and acquire the necessary

machinery and equipment, for three specified purposes: (1) building or equipping any complete naval vessel or portion thereof; (2) repairing, altering or converting any naval vessel; and (3) the manufacture or production of ordnance material, munitions or armor.

Act of July 29, 1941, Chapter 328, 55 Stat. 608.

The Second War Power Act empowered the Secretary of the Navy to acquire real property or any temporary use thereof or other interest therein "that shall be deemed necessary for military, naval or other war purposes", and, after acquiring that interest, to dispose of the property by sale, lease or otherwise in accordance with Section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Such disposition may be made with or without advertising, after the property has been improved, used or occupied, and may provide for the operation and maintenance of plants, buildings, etc. constructed by the government through private interests under contract entered into with the government, or, when it will promote the National defense, under such terms as the Secretary of the Navy might see fit.

Second War Powers Act of March 27, 1942, Chapter 199, Public Law 507, 77th Congress, 2nd Session.

Purporting to act under this Congressional authority the Secretary of the Navy made a written declaration of taking appellee's property "for immediate public use by the United States of America for the establishment of essential equipment and facilities for

the expansion of the American Forge Company, Berkeley, California, for use in the production of steel forgings" (R. 11-15).

The declaration of taking was filed contemporaneously with the complaint and the District Court made its judgment giving the United States immediate title in fee simple absolute, declaring the public purpose to be "for use by the United States of America for the establishment of essential equipment and facilities for the expansion of the American Forge Company, Berkeley, California, for the use in production of steel forgings, and for such other uses as may be authorized by Congress or by executive order" (R. 17-21).

The complaint therewith filed alleged that the property was taken by the United States "for the establishment of essential equipment and facilities for the expansion of the American Forge Company, Berkeley, California, for use in the production of steel forgings for naval purposes" (R. 3).

The complaint is silent as to whether the property was to be used by the United States of America or by the American Forge Company alone, nor did it allege that the American Forge Company was under contract with the United States of America, nor under what terms, if any, the United States of America was disposing of the property, if it was disposing of the property, to American Forge Company (R. 3).

Although appellant had ample opportunity to do so, its complaint was not amended to set forth, as is

asserted in its brief, that the government "had commenced construction, and at the time lot 75 was dismissed from the proceeding the project was nearing completion". This situation was not brought to the attention of the District Court, nor is there anything before this Court to show whether any building or equipment has been placed on the land, or, if so, by whom, or under what terms.

We are, therefore, concerned only with these questions: (1) Does the complaint in condemnation set forth a taking pursuant to the statutes of the United States therein referred to? (2) Has Congress the constitutional power to authorize the Secretary of the Navy to condemn private property for use by another private owner under contract with the United States to manufacture items for National defense? (3) Has Congress the power, under the Constitution of the United States, to authorize the Secretary of the Navy to condemn private property for the purpose of disposing of it to another private interest "under such terms and conditions as he may deem it advisable"? (4) Has the United States Government the power under the Constitution to direct the condemnation of private property for the avowed purpose of forthwith disposing of it to another private owner?

THE UNITED STATES SEEKS APPELLEE'S PROPERTY FOR A PRIVATE PURPOSE.

The statutory provisions set forth in the appendix to appellant's opening brief and summarized in the

statement of the case provide for a taking *for the use of the United States* and provide for the transfer by the United States *after the taking,* either to a private concern under contract to manufacture naval equipment or under such other terms and provisions as the Secretary of the Navy may see fit. Although given two opportunities to amend (R. 35, 36) appellant nowhere sets forth in its complaint that the land was taken *for the use by the United States* nor did it set forth that the American Forge Company was *under contract with the United States* to produce steel forgings for naval purposes, nor under what other terms it was disposing of this property to American Forge Company. If all of the facts set forth in the complaint were established, the property is taken for the primary purpose of enlarging the American Forge Company, that the American Forge Company may produce steel forgings for naval purposes more readily than it could without the property. Under the allegations of the complaint, and the proofs that would be submitted in support of these allegations, no concern other than the American Forge Company could use appellee's property to make forgings for naval purposes, and American Forge Company could not be required to make steel forgings for naval purposes. The result of a judgment for condemnation pursuant to the allegations of the complaint would be that appellee would be deprived of her property and American Forge Company would acquire it; yet no steel forgings for naval purposes need ever be produced nor the land used for the production of steel forgings for naval purposes. Such a judgment, rather than carry-

ing out the purposes of the Congressional authorization, would defeat those purposes and take appellee's property under forced sale, contrary to appellee's wishes, for uses unauthorized by the statute, and provide to American Forge Company something that, for all that appears, American Forge Company may have long desired, yet not have been able to accomplish legally.

On the contrary, if we concede for the purposes of argument that the condemnation proceeding is pursuant to the statutes, and concede for the purposes of argument, what does not appear, that the Secretary of the Navy is disposing of appellee's property "under such terms and conditions as he may deem it advisable", or to enable American Forge Company to carry out more readily a contract for war materials between itself and the United States, Congress still has not the power under the United States Constitution to condemn for this purpose.

Every government has the inherent right to condemn private property to execute its functions. This right is limited by the constitutional provision, that private property shall not be taken for a public use without just compensation being first paid.

United States Constitution, Amendment 5.

This constitutional limitation has been construed to mean that private property cannot be taken for a private use under any circumstances.

Kohl v. United States, 91 U. S. 367.

Excess condemnation has been declared constitutional where the excess is taken for the purpose of

protecting the public improvement, but declared a taking without due process of law where a state seeks to condemn for the purpose of resale to private individuals.

Cincinnati v. Vester, 281 U. S. 439.

Three decisions appear to cast doubt upon this rule. In *United States v. 243.22 Acres,* 129 F. (2d) 678 (C.C.A. 2, 1942), the owner sought to prove that the Secretary of War *intended* to resell the land to a private company. This proof was rejected. The taking, however, was for a public purpose, to-wit: the establishment of an airport. The use for which it was taken was use by the United States. The proof sought to question the manner in which the United States would put the property to a public use after it was taken. It was held that evidence of the state of mind of the Secretary of War, *apart from his expressed declaration of taking,* was not admissible. The taking by the United States for the pre-expressed purpose of enlarging a private company's resources, independent of any obligation that such company might owe the United States, was not involved.

In *Brown v. United States,* 263 U. S. 78, the power to condemn to establish a town site as a substitute for one flooded was sustained. There the property was available for purchase and use *by a group* of individuals. The taking was not limited to the resale to one specific individual nor to the use by one specific company and none other. The expressed purpose of taking was for a town site of benefit to many square miles of surrounding country and in excess of 1000

persons. The establishment of the town site was an integral part of another public project, the construction of a dam for power, irrigation and flood control purposes.

In *Highland v. Russell Car Company,* 279 U. S. 253, sustaining a 1917 coal price regulation, the decision was based upon the due process clause. The court carefully pointed out that the owner of the coal was not required to part with it, but merely required to sell at a price consistent with the interests of national defense, if he did sell. The instant statute, rather than regulating the price at which respondent could sell her property if she wished, purports to compel her to sell it to a private owner against her wish.

None of the cases cited by counsel conflict with the rule established in *Cincinnati v. Vester,* supra, that a taking of private property for resale to another individual for private use and private profit is unconstitutional. This rule is sustained by *Opinion of Justices,* 204 Mass. 607, 27 L. R. A. (N. S.) 483.

The case in which appellant places most confidence is *United States v. 243.22 Acres,* supra, and this language of the Circuit Court of Appeals—"a decision of the Secretary of War is not open to judicial inquiry. That is fortunate, for if it were open, the ensuing delay would delight our country's enemies". Mr Chief Justice Chase with three associates once expressed the thought that in time of war much more latitude must be given to Congress in the exercise of the war powers, and citizens must expect infringement of their peacetime constitutional rights. This opinion was written

because Mr. Justice Chase, with a minority of the court, disagreed with the majority opinion in *Ex parte Milligan,* 4 Wall. 2, that the Constitution and the Bill of Rights are not suspended during time of war, and that Congress has not the power, under any conditions short of a complete breakdown of the judicial system and actual armed conflict in the territory affected, to deprive any citizen of any constitutional right other than the limited deprivation of the Writ of Habeas Corpus.

> "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government,

within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.

* * * * * * * *

"This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to free men. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President or Congress or the Judiciary disturb, except the one concerning the writ of habeas corpus."

Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281 (pages 295 and 297).

AN EX PARTE JUDGMENT ON DECLARATION OF TAKING IS NOT APPEALABLE.

Appellee joins appellant in its able argument that the judgment on the declaration of taking was not appealable, and is not *res judicata* upon the right of the United States to acquire the property. The judgment was *ex parte*. To hold this judgment appealable would be to force the owner whose land was summarily taken to stand upon the bare record presented by the government in obtaining the order. On such appeal no facts would be before this court except such as appear in the declaration of taking, the *ex parte* judgment and the complaint, notwithstanding at a trial on the merits evidence might not be found to support those recitals. That such an order is interlocutory and that an appeal cannot be taken from it was held in:

Luxton v. North River Bridge Co., 147 U. S. 337, 341 (1893);

Southern Ry. Co. v. Postal Telegraph Co., 179 U. S. 641, 643 (1901);

Grays Harbor Co. v. Coats-Fordney Co., 243 U. S. 251, 256 (1917);

Wick v. Superior Court, 278 U. S. 575 (1928);

Dieckmann v. United States, 88 F. (2d) 902 (C.C.A. 7, 1937).

The two cases which throw some cloud upon the foregoing rule are *Oakland v. United States,* 124 F. (2d) 959, and *Puerto Rico Railway Light and Power Company v. United States,* 131 F. (2d) 491. These cases are referred to hereafter as the *Oakland* case and the *Puerto Rico* case, respectively.

By entertaining the appeal in the *Oakland* case this Circuit Court impliedly held that an appeal could be taken. But in that case a motion was made to set aside the judgment on declaration of taking. The appeal was from the order denying the motion. Thus, a hearing had been had at which each party had an opportunity to present his case.

In the *Puerto Rico* case the judgment on declaration of taking was made *ex parte* and was vacated on motion. A new petition for a judgment on declaration of taking was made and a demurrer to that petition was filed and argued. A new judgment on declaration of taking was thereafter made and the appeal was taken from the new judgment. The jurisdiction of the court to hear this appeal was expressly upheld. Here, again, each party had an opportunity to be heard.

In no case has an appeal from the final judgment been denied because it should have been taken from the *ex parte* judgment on declaration of taking. The language of the decisions and their ultimate holding can be reconciled only by the application of the rule that a motion may be made to vacate the judgment on declaration of taking or the judgment may be made after a hearing. In either case the aggrieved party who has had his hearing may take an appeal from the judgment with which he is dissatisfied. But his rights are not precluded by an appeal from an *ex parte* judgment against him. He may, if he chooses, sit back until the time of trial. An appeal from the final judgment fixing the amount due upon the taking raises the question of the right of the government to take in the

first instance, i.e. whether the taking is for a public use.

> "It is well established that in considering the application of the 14th Amendment to cases of expropriation of private property, the question what is a public use is a judicial one. In deciding such a question, the court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this court must decide in performing its duty of enforcing the provisions of the Federal Constitution."
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> *Cincinnati v. Vester,* 281 U. S. 439, 74 L. Ed. 950, at page 955.

CONCLUSION.

It is respectfully submitted that the use for which the property is sought to be taken is for the sole benefit of American Forge Company and no other member of the public can possibly benefit unless American Forge Company thereafter uses the property for the public benefit, which, from all that appears in the complaint, it is not required to do. Should it refuse to so use the property before the United States passes title to it, under the present complaint the United States can use appellee's land for no other purpose. Since, in the ultimate, whether the use is public is a judicial question, it is submitted that this court should sustain the United States District Court

in its dismissal of this action because the use for which this property is taken is a private, not a public, use.

Dated, Berkeley, California,
May 5, 1943.

Respectfully submitted,
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